

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	File No. EB-07-SE-166
XLNT Idea, Inc.)	NAL/Acct. No. 200932100004
San Diego, California)	FRN # 0018234369

FORFEITURE ORDER

Adopted: December 7, 2009**Released: December 9, 2009**

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of fourteen thousand dollars (\$14,000) against XLNT Idea, Inc. (“XLNT Idea”) for willful and repeated violations of Section 302(b) of the Communications Act of 1934, as amended (“*Act*”),¹ and Section 2.803(a) of the Commission’s Rules (“*Rules*”).² The noted violations involve the marketing of unauthorized digital devices in the United States.

2. On November 4, 2008, the Chief, Spectrum Enforcement Division, Enforcement Bureau (“*Division*”) issued a Notice of Apparent Liability (“*NAL*”) for Forfeiture to XLNT Idea in the amount of fourteen thousand dollars (\$14,000).³ XLNT Idea filed a response to the *NAL* on December 5, 2008.⁴

II. BACKGROUND

3. On February 11, 2008, the Division issued a letter of inquiry (“*LOI*”)⁵ to XLNT Idea regarding a complaint received alleging that XLNT Idea was marketing the Nexis 100AP AutoPrinter, the Nexis 100AP Publisher, and the Xi440 CD/DVD Printer in the United States without the appropriate labels as required in Section 15.19 of the Rules,⁶ and prior to testing for compliance with Sections 15.107 and 15.109 of the Rules.⁷ XLNT Idea filed its response to the *LOI* on March 12, 2008,⁸ and stated that it

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a).

³ *XLNT Idea, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 16417 (Enf. Bur., Spectrum Enf. Div. 2008) (“*NAL*”).

⁴ See Letter from Chalapathi R. Atluri, CEO, XLNT Idea, Inc., to the Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (December 3, 2008) (“*NAL Response*”).

⁵ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to XLNT Idea, Inc. (February 11, 2008).

⁶ 47 C.F.R. § 15.19.

⁷ 47 C.F.R. §§ 15.107, 15.109.

manufactures the Nexis 100AP AutoPrinter, the Nexis 100AP Publisher, and the Xi440 CD/DVD Printer at its facility in San Diego, California and markets all three devices for both residential and commercial use, and that until receipt of the LOI it was unaware of the applicable FCC technical and labeling requirements.⁹ XLNT Idea stated further that subsequent to receipt of the LOI, it had completed testing of the devices, and asserted that the testing demonstrates that it has satisfied the Declaration of Conformity requirements for these devices.¹⁰

4. On November 4, 2008, the Division released a *NAL* finding that XLNT Idea marketed the Nexis 100AP AutoPrinter, the Nexis 100AP Publisher, and the Xi440 CD/DVD Printer in the United States prior to authorization.¹¹ We noted that the Nexis 100AP AutoPrinter and the Nexis 100AP Publisher are identical except that the Nexis 100AP Publisher can burn cds and dvds; therefore, testing and authorization of the Nexis 100AP Publisher is sufficient to demonstrate compliance of the Nexis 100AP AutoPrinter. Thus, the *NAL* found that XLNT Idea marketed two distinct unauthorized devices prior to authorization. XLNT Idea's marketing of each of these devices was found to be a separate continuing violation.¹² Accordingly, the Division proposed a forfeiture in the amount of \$14,000 for the apparent willful and repeated violations of Section 302(b) of the Act and Section 2.803(a) of the Rules.

5. In its *NAL* Response, XLNT Idea does not dispute that it marketed and manufactured two distinct unauthorized devices prior to authorization. Instead, it only seeks a reduction or cancellation of the proposed forfeiture due to an inability to pay. In support of this claim, XLNT Idea asserts that its business is funded by debt and operates with limited resources.¹³ XLNT explains that even after three years and a few successful products, it is not financially able to control its manufacturing process.¹⁴ XLNT Idea also asserts that it could not afford expensive consultants to guide it through regulatory and other legal issues.¹⁵ XLNT Idea states that the proposed forfeiture is a heavy burden.¹⁶ To substantiate these claims, XLNT Idea submits federal tax returns for 2006, 2007, and a financial statement for 2008.

(Continued from previous page ...)

⁸ See Letter from Michael J. Schrier, Esquire, counsel for XLNT Idea, Inc., to Gabriel Collazo, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (March 12, 2008) ("LOI Response").

⁹ *Id.* at 2-3, 7-8, 12.

¹⁰ See LOI Response at 4-6, 8-10, 13-14. XLNT Idea noted that because the Nexis 100AP AutoPrinter and Nexis 100AP Publisher are identical except that the Nexis 100AP AutoPrinter cannot burn cds or dvds, it was only necessary to test the Nexis 100AP Publisher and the tests results for the Nexis 100AP Publisher also demonstrate compliance of the Nexis 100AP AutoPrinter. *Id.* at 4. The test report covering the Nexis 100AP AutoPrinter and Nexis 100AP Publisher was dated February 28, 2008. The test report for the Xi440 CD/DVD Printer was dated March 8, 2008.

¹¹ *NAL*, 23 FCC Rcd at 16420.

¹² *Id.*, citing *San Jose Navigation, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 2873 (2006), *forfeiture ordered*, 22 FCC Rcd 1040 (2007), *response pending*; *Samson Technologies, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 4221, 4225 (2004), *consent decree ordered*, 19 FCC Rcd 24509 (2004) (both finding that the marketing of each separate model of unauthorized equipment constitutes a separate violation).

¹³ *NAL* Response at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

III. DISCUSSION

6. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,¹⁷ Section 1.80 of the Rules,¹⁸ and the Commission's *Forfeiture Policy Statement*.¹⁹ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.²⁰

7. XLNT Idea, in responding to the *NAL*, does not dispute that it marketed and manufactured two distinct unauthorized devices prior to authorization, and it only seeks a reduction or cancellation of the proposed forfeiture due to an inability to pay. We have considered XLNT Idea's response to the *NAL* in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that XLNT Idea willfully²¹ and repeatedly²² violated Section 302(b) of the Act and Section 2.803(a) of the Rules and that no mitigating circumstances warrant cancellation or further reduction of the proposed forfeiture amount.

8. In analyzing financial hardship claims, the Commission generally looks to a company's gross revenues as a reasonable and appropriate yardstick to determine their ability to pay assessed forfeitures.²³ Indeed, the Commission has stated that if a company's gross revenues are sufficiently large, the fact that net losses are reported, alone, does not necessarily signify inability to pay.²⁴

¹⁷ 47 U.S.C. § 503(b).

¹⁸ 47 C.F.R. § 1.80.

¹⁹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

²⁰ 47 U.S.C. § 503(b)(2)(E).

²¹ Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. NO. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*").

²² Section 312(f)(1) of the Act defines "repeated" as "the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(1). *See also Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

²³ *See PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("*PJB Communications*"); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07.

²⁴ *See PJB Communications*, 7 FCC Rcd at 2089 (noting that information about net losses may be relevant in assessing an inability to pay claim, but where "gross revenues are sufficiently great ... the mere fact that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture.") *See also Local Long Distance, Inc.*, Forfeiture Order, 15 FCC Rcd 24385, 24389 (2000), *recon. denied*, 16 FCC Rcd 10023, 10025 (2001); *Independent Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 9605 (1999), *recon. denied*, 15 FCC Rcd 16060 (2000); *Frank Neely*, Forfeiture Order, 19 FCC Rcd 16135, 16135-16136 (Enf. Bur. 2007), *recon. denied*, 22 FCC Rcd 1434, 1436 (Enf. Bur. 2007) ("*Frank Neely*"); *Hoosier Broadcasting Corporation*, Forfeiture Order, 14 FCC Rcd 3356 (Consumer Info. Bur. 1999), *recon. denied*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) ("*Hoosier Broadcasting*"); *Side by Side, Inc.*, Forfeiture Order, 23 FCC Rcd 7393, 7395 (Enf. Bur., Spectrum Enf. Div. 2008), *review pending*.

9. Based on the documentation provided, we find that XLNT Idea has not demonstrated that a reduction or cancellation of the proposed forfeiture is warranted. XLNT Idea's financial documents for the most recent three-year period reflect gross revenues that effectively negate the financial hardship claim as it relates to the forfeiture amount before us. Specifically, the proposed forfeiture of \$14,000 expressed as a percentage of XLNT Idea's gross revenues is significantly less than the threshold used to determine an inability to pay reduction.²⁵ In this case, the forfeiture represents a percentage of XLNT Idea's gross revenues that falls well within the percentage range generally considered payable. As the Commission has recognized, if a violator could escape meaningful sanctions for violations of the Rules by seeking an inability to pay reduction that is unsupported by its gross revenues, it would be in a position to undermine the remedial purposes of Section 503 of the Act.²⁶

10. As a result of our review, we conclude that that no reduction or cancellation is warranted for an inability to pay. Accordingly, we find that XLNT Idea willfully and repeatedly violated Section 302(b) of the Act and Section 2.803(a) of the Rules and that a forfeiture in the amount of \$14,000 is appropriate.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²⁷ XLNT Idea, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of fourteen thousand dollars (\$14,000) for willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.

12. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. XLNT Idea, Inc. will also send electronic notification on the date said payment is made to Celia Lewis at Celia.Lewis@fcc.gov and to Ricardo Durham at Ricardo.Durham@fcc.gov.

²⁵ See, e.g., *PJB Communications*, 7 FCC Rcd at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting*, 15 FCC Rcd at 8641 (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

²⁶ See, e.g., *Frank Neely*, 22 FCC Rcd at 1435.

²⁷ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

13. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class mail and certified mail return receipt requested to Chalapathi Rao Atluri, Chief Executive Officer, XLNT Idea, Inc., 6262 Ferris Sq., San Diego, CA 92121.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau